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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 928

MARSHALL & HUSCHART MACHINERY CO., an Illinois corporation,

Petitioner,

vs.

DEPARTMENT OF REVENUE, STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	3
Reasons for Granting the Writ	8
Conclusion	13
Appendix A:	
Article I, Section 8, United States Constitution	1a
Sec. 1, Amendment XIV, United States Constitution	1a
Sec. 1, Illinois Retailers' Occupation Tax Act, Sec. 440, Ch. 120, Ill. Rev. Statutes	1a
Sec. 2, Illinois Retailers' Occupation Tax Act, Sec. 441, Ch. 120, Ill. Rev. Statutes	1a
Appendix B:	
Opinion Illinois Supreme Court January 22, 1960	2a
Appendix C:	
Denial of Petition for Rehearing	8a
Appendix D:	
Complaint, Circuit Court of Cook County, Illinois to review final determination of the Department of Revenue under the Retailers' Occupation Tax Act	9a
Exhibit "A" to Complaint—Circuit Court Letter Ruling of Department of Revenue, September 27, 1946	17a
Exhibit "B" to Complaint—Circuit Court Ruling of Department of Revenue, March 20, 1951	22a

PAGE

Appendix E:

Judgment Order of Circuit Court, Cook County, Illinois, in favor of Respondent 24a

Appendix F:

Petition for Rehearing in Illinois Supreme Court.. 26a

Appendix G:

Final Assessment of tax by Respondent Department of Revenue against Petitioner 33a

Table Of Cases.

Marshall & Huschart Machinery Co. v. Department of Revenue, State of Illinois, 18 Ill. 2d 496 ..... 2a, 4, 6, 7, 8, 10, 11, 12

Norton Co. v. Department of Revenue, State of Illinois, 340 U.S. 534, 95 L. Ed. 519 9

Norton Co. v. Department of Revenue, State of Illinois, 405 Ill. 314, 90 N.E. 2d 737 9

Constitutional Provisions And Statutes.

Section 1, Amendment XIV, Constitution of the United States 2, 3, 4, 9, 10, 11, 13

Section 1, Illinois Retailers' Occupation Tax Act, Sec. 440, Ch. 120, Ill. Rev. Statutes 3, 5, 12

Section 2, Illinois Retailers' Occupation Tax Act, Sec. 441, Ch. 120, Ill. Rev. Statutes 3, 6, 8, 9, 11

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DEPARTMENT OF REVENUE, STATE OF ILLINOIS,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, Marshall & Huschart Machinery Co., an Illinois corporation, respectfully prays that a Writ of Certiorari issue to review a final judgment of the Supreme Court of the State of Illinois affirming a judgment for Respondent entered in the Circuit Court of Cook County, Illinois, in an action for Administrative Review of a final determination by the Respondent Department of Revenue of the State of Illinois of an assessment of an Illinois Retailers' Occupation Tax deficiency against Petitioner.

OPINIONS BELOW.

The Final assessment of tax against Petitioner is in Appendix G, p. 32a, and Record, page 1053. The judgment of the Circuit Court of Cook County, Illinois, (App. E, p. 24a, Rec. 36, Abst. 2a) was not officially reported. The Opinion of the Illinois Supreme Court (App. B, *infra* 2a) is reported at 18 Ill. 2d 496.

JURISDICTION.

The Opinion of the Supreme Court of Illinois was filed on January 22, 1960, copy thereof being appended hereto (App. B, *infra* 2a) and to the certified copy of the Record filed with this Petition. Timely Petition of Marshall & Huschart Machinery Co. for Rehearing was denied on March 28, 1960 (App. C, p. 8a). Jurisdiction of this Court is invoked under Article I, Section 8, and Section 1, Amendment XIV to the Constitution of the United States of America.

QUESTIONS PRESENTED.

1-a. Whether the State of Illinois can levy a direct tax against interstate commerce.

1-b. More specifically, whether the State of Illinois can assess Illinois Retailers' Occupation Tax on an interstate sale of machinery from an out-of-state manufacturer to an Illinois customer.

Petitioner claims such a levy violates the Commerce Clause of the United States Constitution.[1]

2. Whether, on an interstate sale by an out-of-state manufacturer to an Illinois customer, the State of Illinois can assess the Illinois Retailers' Occupation Tax against a local resident agent of such out-of-state manufacturer, where the local agent's authority is limited strictly, by

[1] Article I, Section 8, U.S. Constitution, App. A, p. 1a.

written contract, to the solicitation of the order and the forwarding thereof to the out-of-state manufacturer.

Petitioner claims that the levy of the tax on such limited agent is (a) a direct tax on interstate commerce in violation of Article I, Section 8, of the United States Constitution; (b) a tax on a person who did not make the sale, and therefore a deprivation of property without due process of law; and (c) a denial to such agent by the State of the equal protection of the laws; in violation of Section 1, Amendment XIV to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of Article I, Section 8, and Section 1, Amendment XIV to the Constitution of the United States, and the pertinent portions of the Illinois Retailers' Occupation Tax Act, Chapter 120, Sections 440 and 441, Illinois Revised Statutes are set out in Appendix A hereto.

STATEMENT.

Petitioner claims that the transactions sought to be taxed by the Illinois Department of Revenue are interstate sales, made to Illinois residents by out-of-state manufacturers, for whom Petitioner, by express contract, acted as a limited agent to solicit orders only. By express statutory provision and under the Commerce Clause of the Constitution of the United States, this tax "is not imposed upon the privilege of engaging in business in interstate commerce."[2]

Petitioner further claims that it acted only as an agent of the out-of-state factories which made these sales, and, not having made the sales, is therefore not

[2] Section 2, Retailers' Occupation Tax Act, App. A, p. 1a Ch. 120, Sec. 441, Ill. Rev. Stats.

liable for the tax in any event. The assessment has not been made against the out-of-state factories through Petitioner as their agent, but has somehow been levied against the Petitioner as principal.

The federal questions to be reviewed are (1) that the Tax assessed is a direct tax on interstate sales in violation of Article I, Section 8 of the Constitution of the United States; (2) that the levy of this Tax against Petitioner, who did not make the sales, denies it the equal protection of the laws, and (3) the levy of this Tax deprives Petitioner of its property without due process; contrary to the guarantees provided Petitioner by Section 1, Amendment XIV to the Constitution of the United States.

The above constitutional objections to the imposition of this local State tax on Petitioner were raised throughout the administrative hearings before the Department of Revenue (Abst. 12, 65, 259, 260, 261 and 262), and were raised in the Complaint in the Circuit Court of Cook County, Illinois (App. D, pp. 13a, 14a) and were again raised in the Appeal to the Illinois Supreme Court (Opinion, App. B, pp. 4a, 5a, 18 Ill. 2d 496 at pp. 498, 499, 500), and in Petitioner's Petition for Rehearing in the Illinois Supreme Court (App. F, pp. 30a, 31a).

There is no dispute as to the facts in this case.

Petitioner is a machine tool distributor in Chicago, Illinois. This case arises from an audit by Respondent Department of Revenue of Petitioner's records for the period April 1, 1951 to June 30, 1953. Within the State of Illinois, Petitioner acted as a limited agent only to solicit machine tool orders for out-of-state manufacturers, and had no authority to, and did not in any instance, accept or attempt to accept any such orders thus solicited. (Abst. 59, 65, 66, 85, 170, 171, 176, 177, 187, 189, 190, 231, and 232). No one in the State of

Illinois had any authority to accept orders for these out-of-state manufacturers (Abst. 65, 66, 177, 197, 198, 199, 211, 224, 231 and 247). Petitioner was the exclusive agent in Illinois for these out-of-state factories. (Abst. 69, 70). All orders for machine tools solicited by Petitioner within the State of Illinois were required to be, and were, forwarded to the out-of-state manufacturers for acceptance. The out-of-state manufacturers accepted the orders at their various out-of-state factories, fabricated the machines there, and shipped them direct to the Illinois customer, f.o.b. out-of-state point of shipment (Abst. 61, 63, 216, 219, 225 and 245). Title passed directly from the out-of-state manufacturer to the Illinois customer.

The limited authority of the Petitioner to solicit these orders only, was a matter of written contract between Petitioner and each out-of-state manufacturer (Abst. 65, 66, 177, 197, 211, 224, 231 and 247).

The Illinois Retailers' Occupation Tax Act specifically defines a "Sale at Retail" subject to tax under that Act as one which "necessarily involves the passage of title from the Seller to the Buyer." (Sec. 1, Retailers' Occupation Tax Act, Ch. 120, Sec. 440, Ill. Rev. Stats. App. A, p. 1a).

It is undisputed in the Record that Petitioner, which only solicited orders, never received title to these machines from the manufacturers, and did not convey title to the Illinois customers (Abst. 63, 187-189 and 200-210). Title passed directly from the manufacturer, who accepted the order, to the customer who had placed the order with the manufacturer. (Abst. 63, 187-189 and 200-210).

The Respondent Department of Revenue has not at any stage of these proceedings advanced any reason or theory to support the claimed liability of Petitioner for this tax. In its brief filed in the Illinois Supreme Court, the Department admitted that the sales in question were made